Bukit Lenang Development Sdn Bhd v Penduduk-Penduduk yang Menduduki atas Tanah HS (D) 151079 – HS(D)151601, Mukim Plentong, Daerah Johor Bahru

HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO 235 TAHUN 1997
ZAINUN ALI J
18 DECEMBER 1998

Land Law *— Adverse possession — Squatters — Allegation of payment of money to previous owner as deposit to land — Whether defendants were licensees or mere squatters — Whether equity by acquiescence arose to prevent owner from asserting right over land*

The plaintiff entered into a sale and purchase agreement with Oakfield Enterprise Sdn Bhd ('Oakfield') to purchase certain lots of land. The lots were occupied by persons unknown to the plaintiff. Oakfield informed the plaintiff that the unknown persons had unlawfully entered the lots and occupied the same without licence or consent of Oakfield. Oakfield had obtained a court order to remove the trespassers and subsequently a writ of possession was obtained. However, attempt to evict the trespassers was unsuccessful. This led Oakfield to applying for a committal order. The plaintiff made an application for vacant possession under O 89 of the Rules of the High Court 1980. It was submitted that neither the plaintiff nor Oakfield had given licence or consent to the defendants and thus the defendants were at law squatters on the said lots. The defendants submitted that they had paid RM3,000 each to Oakfield as earnest deposit for their respective lots. The payment was accompanied with a sort of proforma on the purchase entitled 'Borang Permohonan dan Pengakuan Minat' ('Appendix B'). It was stated in Appendix B, inter alia, 'penerimaan permohonan dan persetujuan menjual kepada saya terpulang dan bergantung kepada persetujuan pihak Oakfield Enterprise Sdn Bhd menjual kepada saya'. The issue before the court was whether the defendants were licensees or mere squatters.

Held, allowing the application:

(1) On the true construction of Appendix B, the court found that it did not constitute a legally binding contract between the parties but merely a guideline to the defendants on the sale and purchase of the lands in question. It was a mere expression of the defendants' desire to purchase subject to various conditions which remain unfulfilled and more importantly which was still subject to a proper acceptance by Oakfield (see pp 32E–33A).

(2) The defendants' payment of RM3,000 as earnest deposit for the land was subject to survey of the land and subject to Oakfield thereafter accepting the offer to purchase. Oakfield had presumably not accepted the offer and thus went on to sell the lands to the plaintiff (see p 33B).

(3) There was no evidence that it was Oakfield who had induced the defendants to purchase the respective lots. In the absence of such evidence, the court failed to see how it could be said against the plaintiff that he had raised an equity by acquiescence so as to prevent him asserting his legal and proprietary rights on the land and estop him from making his claim against the defendants for the removal of the encroachment. It was apparent that the defendants may be gratuitous licensees only whose rights cease upon the registered owner's assertion of his rights (see p 33C–E).

(4) It was Oakfield which had the right at the material time as registered proprietor to the defendants consent to remain thereon or otherwise. By selling the land to the plaintiff, Oakfield had divested itself of all rights which the law conferred upon it as a registered proprietor of the land which right now vests with the plaintiff. Consequently, there was no consent given or licence granted by the plaintiff (see p 34C–E).

(5) The exception to O 89 would be in regard to the tenant or tenants holding over after the termination of the tenancy and these exceptions are clearly set out in the words and the parenthesis of the said order. The defendants did not come within this exception (see p 35A–B).

(6) A person who enters upon another's land and remains thereon to the detriment of the present owner is a trespasser, pure and simple. On the facts, the court found that the defendants were squatters simpliciter and were therefore not possessed of any rights. In fact, when the plaintiff became the registered proprietor, the defendants became mere trespassers. The defendants had therefore failed to establish the existence of any triable issues in this case. In that connection, the mode under O 89 was correctly applied for by the plaintiff (see p 36E–I).

[Bahasa Malaysia summary

Plaintif telah memasuki suatu perjanjian jual beli dengan Oakfield Enterprise Sdn Bhd ('Oakfield') untuk membeli lot-lot tanah yang tertentu. Lot-lot tersebut adalah diduduki oleh orang-orang yang tidak dikenali oleh plaintif. Oakfield memberitahu plaintif bahawa orang-orang yang tidak dikenali tersebut telah secara tidak sah memasuki lot-lot tersebut dan menduduki lot-lot tersebut tanpa lesen atau kebenaran Oakfield. Oakfield telah memperolehi suatu perintah mahkamah untuk menyingkirkan penceroboh-penceroboh tersebut dan kemudiannya suatu writ pemilikan telah diperolehi. Walau bagaimanapun, cubaan untuk mengusir penceroboh-penceroboh tersebut tidak berjaya. Ini menyebabkan Oakfield memohon untuk suatu perintah komital. Plaintif membuat suatu permohonan untuk milikan kosong di bawah A 89 Kaedah-Kaedah Mahkamah Tinggi 1980. Adalah dihujahkan bahawa kedua-dua plaintif ataupun

Oakfield tidak pernah memberi lesen atau kebenaran kepada defendan-defendan dan maka defendan-defendan adalah dari segi undang-undang merupakan setinggan-setinggan di lot-lot tersebut. Defendan-defendan menghujahkan bahawa mereka telah membayar RM3,000 setiap orang kepada Oakfield sebagai deposit cengkeram untuk lot-lot masing-masing mereka. Pembayaran tersebut adalah disertakan bersama-sama dengan suatu jenis proforma di atas pembelian tersebut yang bertajuk 'Borang Permohonan dan Pengakuan Minat' ('Lampiran B'). Adalah dicatat di dalam Lampiran B, inter alia, 'penerimaan permohonan dan persetujuan menjual kepada saya terpulang dan bergantung kepada persetujuan pihak Oakfield Enterprise Sdn Bhd menjual kepada saya'. Isu yang timbul di hadapan mahkamah adalah sama ada defendan-defendan merupakan pemegang-pemegang lesen atau semata-mata setinggan-setinggan sahaja.

Diputuskan, membenarkan permohonan:

(1) Di atas pentafsiran sebenar Lampiran B, mahkamah mendapati bahawa ia bukan merupakan suatu kontrak sah yang mengikat di antara parti-parti tersebut tetapi hanya merupakan suatu garis panduan kepada defendan-defendan berkenaan tentang jual beli tanah-tanah yang dipertikaikan tersebut. Ia hanya merupakan suatu ungkapan berkenaan dengan keinginan defendan-defendan untuk membeli tertakluk kepada berbagai-bagai syarat-syarat yang masih belum dilaksanakan dan lebih pentingnya adalah masih tertakluk kepada suatu penerimaan yang betul oleh Oakfield (lihat ms 32E–33A).

(2) Pembayaran defendan-defendan sebanyak RM3,000 sebagai deposit cengkeram untuk tanah tersebut adalah tertakluk kepada kerja-kerja mengukur tanah tersebut dan tertakluk kepada Oakfield kemudiannya menerima tawaran untuk membeli. Oakfield telah barangkali tidak menerima tawaran tersebut dan dengan demikian telah meneruskan dengan penjualan tanah-tanah tersebut kepada plaintif (lihat ms 33B).

(3) Tiada terdapat keterangan bahawa Oakfield telah mendorong defendan-defendan untuk membeli lot-lot masing-masing tersebut. Memandangkan ketiadaan keterangan yang sedemikian, mahkamah gagal memahami bagaimana ia boleh dikatakan terhadap plaintif bahawa beliau telah menimbulkan suatu ekuiti melalui persetujuan yang menyebabkan beliau dihalang daripada menegaskan hak beliau di sisi undang-undang dan hak keempunyaan ke atas tanah tersebut dan mengestop beliau daripada membuat tuntutannya terhadap defendan-defendan untuk penyingkiran pencerobohan tersebut. Ia adalah jelas bahawa defendan-defendan mungkin merupakan hanya pemegang-pemegang lesen yang terhutang budi di mana hak-hak mereka akan tidak wujud lagi apabila pemunya berdaftar menegaskan hak-hak beliau (lihat ms 33C–E).

(4) Oakfield mempunyai hak pada masa yang material sebagai empunya berdaftar terhadap defendan-defendan mengenai kebenaran untuk tinggal di atasnya atau sebaliknya. Dengan menjual tanah tersebut kepada plaintif, Oakfield telah melucutkan dirinya dari semua hak-hak yang dikurniakan di bawah undang-undang sebagai empunya berdaftar tanah tersebut yang mana kini adalah terletak pada plaintif. Akibatnya, tidak ada kebenaran atau lesen yang diberikan oleh plaintif (lihat ms 34C–E).

(5) Kekecualian kepada A 89 adalah berkenaan dengan penyewa atau penyewa-penyewa yang pemegangannya adalah selepas masa penamatan penyewaan dan kekecualian-kekecualian ini adalah jelas dinyatakan di dalam perkataan-perkataan dan parentesis aturan tersebut. Defendan-defendan tidak tergolong di dalam kekecualian ini (lihat ms 35A–B).

(6) Seseorang yang memasuki tanah seorang yang lain dan tinggal seterusnya dan menjejaskan kedudukan pemunya sekarang adalah merupakan seorang penceroboh, semata-mata. Berdasarkan fakta-fakta, mahkamah mendapati bahawa defendan-defendan merupakan setinggan-setinggan simpliciter dan maka tidak mempunyai apa-apa hak-hak. Sebenarnya, apabila plaintif menjadi empunya berdaftar, defendan-defendan menjadi penceroboh-penceroboh semata-mata. Defendan-defendan dengan demikian telah gagal untuk membuktikan kewujudan apa-apa isu-isu yang boleh dibicarakan di dalam kes ini. Berhubungan dengan itu, cara di bawah A 89 adalah secara betul dipohon oleh plaintif (lihat ms 36E–I).]

Notes

For cases on squatters generally, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1372–1373.

Cases referred to

Branson v Stannard (1879) 41 LT 434 (refd)
Branca v Cobarro [1947] 1 KB 854 (refd)
Bristol Corp v Persons unknown [1974] 1 All ER 593 (refd)
Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman [1995] 1 MLJ 457 (refd)
Daiman Development Sdn Bhd v Mathew Lui Chin Teck & Anor [1981] 1 MLJ 56 (refd)
Esso Malaysia Bhd v Hills Agency(M) Sdn Bhd & Ors [1994] 1 MLJ 740 (refd)
Greater London Council v Jenkins [1975] 1 All ER 354 (refd)
Immetec Sdn Bhd v Yong Tai Hoong & Anor [1995] 1 MLJ 390 (refd)
Lai Mew Seng v Cosmopac Sdn Bhd [1998] 1 CLJ 713 (refd)
Lim Chia Min v Cheah Sang Ngeow & Anor [1997] 1 MLJ 127 (refd)
McPhail v persons, names unknown; Bristol Corp v Ross & Anor [1973] 3 All ER 393 (refd)

A *Niesmann v Collinridge* (1921) 29 CLR 177 (refd)
Robert Addie & Sons (Collieries) Ltd v Dumbreck [1929] AC 358 (refd)
Zaibar Auto (M) Sdn Bhd & Anor v Shell Malaysia Trading Sdn Bhd [1996] 2 MLJ 221 (refd)

B **Legislation referred to**

Rules of the High Court 1980 O 89
Rules of the Supreme Court O 26 r 1(1), O 113 r 1

Izzat bin Hj Othman (*Chua Bros. Azzat & Izzat*) for the plaintiff.
C *KH Lim* (*Abdul Razak Ahmad & Assoc*) *Norhayati bt Mohamed* (*Haris Norhayati & Co*) for the defendants.

Cur Adv Vult

Zainun Ali J: In this application for vacant possession under O 89 of the Rules of the High Court 1980 ('the RHC'), the plaintiff having
D countenanced the potential pitfall when purchasing the property without vacant possession, nevertheless went on ahead with the transaction.

The facts

As far as can be discerned from the documents filed, the plaintiff as
E purchaser for value entered into a sale and purchase agreement dated 15 March 1996 with one Oakfield Enterprise Sdn Bhd ('Oakfield') as vendor, to purchase all those lands held in 407 individual lots comprising an area of approximately 2,815,083 sq ft for the sum of RM32,577,452.31, free of encumbrances but without vacant possession.

F The said lots were formerly held in Lot 83 Grant 72 Mukim of Plentong, District of Johor Bahru and now known as HS (D) 151079 to HS(D) 151601 for Lots PTD 64070 to PTD 64592 respectively ('the said lands').

Upon payment of the full purchase price, the plaintiff on 2 October 1996 became the registered proprietor of 401 of the said 407 individual lots
G of land namely HS (D) 151079 PTD 64070 to HS (D) 151275 PTD 64266; HS (D) 151277 PTD 64268 to HS (D) 151303 PTD 64294; HS (D) 151305 PTD 64296 to HS (D) 151325 PTD 64316; HS (D) 151327 PTD 64318 to HS (D) 151365 PTD 64356; HS (D) 151367 PTD 64358 to HS (D) 151385 PTD 64376; HS (D) 151387 PTD 64378 to HS (D)
H 151410 PTD 64401; HS (D) 151412 PTD 64403 to HS (D) 151601 PTD 64592, Mukim Plentong, Daerah Johor Bahru, Negeri Johor ('the said 401 lots').

The said 401 lots were purchased without vacant possession.

The plaintiff made enquiries and was informed that the said 401 lots
I were occupied by persons unknown to the plaintiff. Upon enquiry also, it was revealed that the said 401 lots which form part of the said lands, were purchased from one Jet Age Constructions Sdn Bhd, on 28 June 1986, which had in turn purchased the same as vacant lots from the Official Receiver Malaysia on 1 April 1981.

Oakfield informed the plaintiff that after the said 401 lots were purchased by Oakfield in 1986, various unknown persons had unlawfully entered the said lots and occupied the same without the licence or consent of Oakfield. A

Oakfield had obtained an order of court dated 8 November 1989 to remove the said trespassers from the said lands, and subsequently Oakfield obtained a writ of possession on 6 December 1989 in respect of the said lands but their attempt to evict the said trespassers from the said lands was unsuccessful. B

This led to Oakfield applying for a committal order which was given by the court on 16 December 1991 against 134 of the named occupiers of the said lands whose execution was stayed until 31 January 1992 upon Oakfield's request. However, since the 134 named trespassers could not be identified specifically, Oakfield did not apply for a warrant for committal against them. C

Apart from the said 134 trespassers, there were others in occupation of the said lands. D

The plaintiff submits that neither the plaintiff nor Oakfield had given licence or consent to the defendants and thus the defendants are at law, squatters on the said 401 lots.

However, a different story emerges from the defendants. It is the defendants' contention that the defendants were keen to purchase their respective lots and some initial discussions for this purpose were held in 1991 with Messrs Hadie Darris, an advocate and solicitor who was appointed by the defendants and other occupants of the said lands. However, no agreement was reached. E

From the documents filed, there appears to be some areas of dispute as to who were actually involved in the discussions but what could be discerned is that the discussions were made at the behest of the defendants. F

Oakfield appears to be a reticent negotiator who nevertheless agreed to enter negotiations, with some conditions attached, whereby inter alia, the defendants were to pay an earnest deposit of RM3,000. Some of the defendants made payment to Messrs J Singh & Co, advocates and solicitors who also represented Oakfield. G

What is of interest is that the plaintiff in its submission downplays the role of Oakfield in these negotiations.

However, from the record before this court, Oakfield had participated in the negotiations. But Oakfield's letter of 25 March 1992 (see Appendix 'A') is guarded. It is not an outright agreement to sell the said lots since the agreement to do so, depended on several factors, as are manifested in the said letter. H

An earlier attempt by Oakfield's solicitors, Messrs J Singh & Co in 1991, to sell the lots was aborted, due to the difficulty in drawing up the parcels of land for the individual purchasers. I

Then between July to October 1994, the defendants paid RM3,000 each to Messrs J Singh & Co as earnest deposit for their respective lots of

land. This payment is accompanied with a sort of proforma on the purchase, which was duly signed and acknowledged by the defendants. The said 'proforma' entitled Borang Permohonan dan Pengakuan Minat (Appendix 'B') reads thus:

> 1 Saya mengakui faham bahawa penerimaan permohonan dan persetujuan menjual kepada saya terpulang dan bergantung kepada persetujuan pihak Oakfield Enterprise Sdn Bhd menjual kepada saya.
>
> 2 Saya faham bahawa perjanjian jual beli adalah mengikut garis panduan yang dinyatakan di dalam lampiran borang ini [dilampirkan].

There seems to be complete inertia on the part of Oakfield from the years 1994 to 1996, when like a bolt from the blue, Oakfield sold the said lands to the plaintiff as evidenced by the agreement of 15 March 1996. J Singh & Co subsequently wrote to one of the defendants, one Puan Fatimah bte Alawi to reimburse her RM3,000 earnest deposit, which the said defendant refused.

The plaintiff meanwhile took the necessary steps to register themselves as proprietor of the land.

The question in issue now is this:

Whether the defendants are mere squatters, or are they licensees or equitable owners?

At the outset this court disagrees with the defendants' contention that there is an intended offer by Oakfield to the defendants as embodied in the 9 September 1991 letter from Messrs J Singh & Co to the defendants. This letter (see Appendix 'C') is in fact written by J Singh & Co to the then solicitors acting for the defendants, ie Messrs Hadie Darris & Co, that the solicitors (J Singh & Co) will proceed with a suit unless the terms of the sale are complied with.

It is thus misleading to say that it is a letter of offer to the defendants to purchase the land. Rather, the letter seems to have the contrary effect.

Counsel for the defendants also contended that the letter from Oakfield (Appendix 'A') is actually a suggestion by Oakfield for the defendants to purchase the land, conditional upon certain factors.

This contention necessitates an interpretation of the Borang Permohonan dan Pengakuan Minat (Appendix 'B').

Several authorities have been cited by the defendants in support of the suggestion that this said Borang is similar to the proforma which would be construed as a binding contract between the plaintiff and defendants: *Lai Mew Seng v Cosmopac Sdn Bhd* [1998] 1 CLJ 713. As also in the case of *Daiman Development Sdn Bhd v Mathew Lui Chin Teck & Anor* [1981] 1 MLJ 56, the parties were clearly bound by the proforma and could not argue that it did not create an obligation to purchase and sell.

Looking at the Borang Permohonan dan Pengakuan Minat in Appendix 'B', the question now is whether the said form constitutes a binding agreement or merely an agreement to enter into an agreement.

This situation seems fraught with difficulties but nevertheless a proper construction is required so as to come to a just conclusion.

It is commonplace that an agreement may be so worded as to envisage that another document is to be entered into and signed by the parties. In such a case it would be a matter of interpretation, regard being had to all the circumstances as to whether the parties have agreed upon all the terms of the contract and merely desire the agreement to be couched in more formal language; or whether the execution of the latter document is a condition precedent to the creation of contractual relations, so that the parties are still in negotiation and further terms are yet to be decided upon or accepted.

In the former case, the agreement is unconditional and a contract has been concluded so that the desire for a formal document may be ignored.

It is also possible for parties legally to make a contract containing terms which the parties regard as vital and to which they are happy to be contractually bound forthwith, although simultaneously they say that they will have a more formal document prepared. The authorities for these are found in: (i) *Branson v Stannard* (1879) 41 LT 434; (ii) *Branca v Cobarro* [1947] 1 KB 854; and (iii) *Niesmann v Collinridge* (1921) 29 CLR 177.

On the other hand, there are cases where the execution of the further document is a condition precedent to the creation of contractual relations and there is therefore no contract. This is either because the condition is yet to be fulfilled or because the law does not recognise a contract to make a contract as distinct from a contract to sign a written document containing the terms upon which the parties have already agreed.

On a true construction of Borang Permohonan dan Pengakuan Minat (Appendix 'B'), this court finds that it does not constitute a legally binding contract between the parties but merely a guideline to the defendants on the sale and purchase of the lands in question. The language in para 1 of the said Borang is explicit in that this agreement is '*terpulanglah dan bergantung kepada persetujuan pihak Oakfield Enterprise Sdn Bhd menjual kepada saya*'.(Emphasis added.)

In this connection, regard must also be had to the wording appended to the official receipt as in Appendix 'D'.

The defendant's payment of RM3,000 to Messrs J Singh & Co as earnest deposit for the land is '*subject to survey of the land and subject to Oakfield thereafter accepting the offer to purchase.*'(Emphasis added).

Thus, as decided in *Lim Chia Min v Cheah Sang Ngeow & Anor* [1997] 1 MLJ 127, when parties propose that a formal agreement would be prepared and executed they must mean what they say, and conversely the same is true.

Following this reasoning, the parties in the present case must also mean what they agreed upon, that is to enter into a sale and purchase agreement subject to several factors.

Although the Borang Permohonan dan Pengakuan Minat does not express this desire to execute a formal agreement to be prepared subsequently, this is a logical consequence to the parties' intention if the conditions are fulfilled.

A The other terms in the said Borang further strengthen the argument that the offer to purchase is tentative (refer to paras 3 and 5 thereof).

Thus on its true construction, the said Borang is but a mere expression of the defendant's desire to purchase subject to various conditions which remain unfulfilled and more importantly, which is still subject to a proper B acceptance by the predecessor in title, ie Oakfield.

Oakfield had presumably not accepted the terms and thus went on to sell the land to the plaintiff, I believe the plaintiff is a purchaser for value of the 407 lots in view of the fact that the price quoted for the sale of the land in Appendix 'C' on 9 September 1991 was RM15m while the said land was finally sold for RM32,577,452.31.

C In this connection, this court therefore rejects the contention of the defendants that there are several serious questions to be tried.

There is no evidence that it was Oakfield who had induced the defendants to purchase the respective lots. In the absence of such evidence, this court fails to see how it can be said against the plaintiff that he had D raised an equity by acquiescence so as to prevent him asserting his legal and proprietary rights on the land and estop him from making his claim against the defendants for the removal of the encroachment.

As can be ascertained, the defendants acted on their own volition in making improvements to their houses. It was not done with the express E consent or otherwise of Oakfield.

Based on the foregoing, what is apparent is that, the defendants may be gratuitous licensees only, whose rights cease upon the registered owner's assertion of his rights (*Immetec Sdn Bhd v Yong Tai Hoong & Anor* [1995] 1 MLJ 390).

The next question in issue is whether O 89 is an appropriate mode of F application in the circumstances. Order 89 of the RHC has always been read as applying to squatters. It does not apply to tenants who are holding over, one who enters upon the land or who remains in occupation with the consent of the applicant under the order or any predecessor-in-title of such an applicant, or persons who are in occupation under a legitimate G expectation of receiving, from the state authority, issue documents of title to the portions they occupy.

The defendants cites the authority of *Zaibar Auto (M) Sdn Bhd & Anor v Shell Malaysia Trading Sdn Bhd* [1996] 2 MLJ 221, to support their case that they have equitable interest in the land since they occupied the land with the consent of Oakfield and that at all times, the plaintiff was fully H aware of the defendants' existence.

This court is of the view, following the principles of *Zaibar Auto* itself, that consent or licence to occupy may only be given by one who is empowered by law to give such consent. In the ordinary case it is the registered proprietor in whom is vested the right of ownership, who may be I given consent or grant in licence to occupy.

The defendants' argument is that it was Oakfield who was the registered proprietor then, who was empowered by law to give such consent at the material time, for the defendants to occupy the land.

However, this court finds that contention untenable because:

(a) the defendants entered the land illegally; and

(b) the defendants were on the land at Oakfield's indulgence as the correspondences and documents have shown and thereafter it is not open to the defendants to now declare that they were on the land with Oakfield's blessings.

If by paying the RM3,000 earnest deposit, it is construed by the defendants as an indication of Oakfield's consent to remain on the land, resulting in the defendants' manifest assertion of their rights as evidenced by their active improvement to their houses, then their relief, if any, would be to bring an action against Oakfield and this court can only read that the defendants' problems are actually self-imposed.

This court is of the view that Oakfield as the predecessor in-title had not made any overt gesture or consent to the defendants to remain on the land, as evidenced by the committal proceedings taken against the defendants. It is Oakfield which had the right at the material time as registered proprietor to give the defendants consent to remain thereon or otherwise.

By selling the land to the plaintiff, Oakfield had divested itself of all rights which the law conferred upon it as a registered proprietor of the land which right now vests with the plaintiff.

Consequently there was no consent given or licence granted by the plaintiff or anyone under its authority.

Whilst it is undisputed that the plaintiff purchased the property without vacant possession, they did not embark upon this venture without regard to their rights.

From the affidavit affirmed by Ong Tee Thong on 6 March 1997, it is evident that the plaintiff knew of the existence of the defendants. However, they also knew of the existence of the court order of 8 November 1989 that gave an order to recover possession to Oakfield. They also knew that Oakfield had obtained a committal order on 16 December 1991 against the defendants. The affirmatives are found in paras 10, 11 and 12 of Ong Tee Thong's affidavit.

Even after having been appraised of the situation, the plaintiff went on ahead with it, safe in the knowledge that their rights are assured under the National Land Code, in that they will obtain a title which is free of all adverse claims or encumbrances not noted on the register. The plaintiff then went on to argue that the defendants are trespassers.

Lord Dunedin in *Robert Addie & Sons (Collieries) Ltd v Dumbreck* [1929] AC 358, described a trespasser as 'one who goes on the land without invitation of any sort and whose presence is either unknown to the proprietor or if known, is practically objected to'.

The defendants' presence on the land is not unknown to Oakfield since there were proceedings in court to oust them. Subsequent events however, have shown that they were on the land on Oakfield's sufferance.

There is also no evidence that the defendants paid rent or contributed in any way as tenants of Oakfield.

Although Azmi SCJ relied on *McPhail*'s case (*McPhail v persons, names unknown; Bristol Corp v Ross & Anor* [1973] 3 All ER 393) to extend the exception to the applicability of O 89 of the RHC to 'licensees holding over', this court respectfully disagrees with that interpretation.

It is this court's view that the exception to O 89 RHC would be in regard to the 'tenant' or tenants holding over after the termination of the tenancy and these exceptions are clearly set out in the words and the parenthesis of the said order. The defendants do not, in the court's view come within this exception. Probably if they did, they would have taken the necessary measures to protect their interest by entering the necessary caveat.

The correct approach to O 89 of the RHC is best illustrated in *Bristol Corp v Persons unknown* [1974] 1 All ER 593. The facts are at p 593C–G are as follows:

> [One] Mrs Daniels was the registered proprietor of a house. In May 1973 it was arranged that Mrs Daniels would sell it to Bristol Corp and she then moved to other premises. A representative of the corporation visited the property in June and found a number of people living in the house, which Mrs Daniels has left empty. On 8 August the corporation became the registered proprietors of the property. In September an officer of the corporation again visited the house and found that it was still occupied by persons whose identities were unknown. The corporation thereupon took proceedings for possession against the occupants by originating summons under RSC O 113 r 1. An affidavit was produced, sworn by one of the occupants, in which he stated that he had visited Mrs Daniels in June to explain their homeless situation to her and that she had 'seemed willing to allow (them) to live there provided that she was still able to sell her house'. The occupants contended that in the circumstances the corporation were not entitled, under RSC O 113, r 1, to a summary order for, if the allegation in the affidavit were substantiated, it would follow that the occupants had 'entered into occupation' with the consent of the Corporation's predecessor in title. [It was] held [that] on its true construction RSC O 113 r 1, covered the case of a person who, although he had entered into occupation of the land with the licence or consent of the person entitled to possession or his predecessor in titles, remained in occupation without such licence or consent. It followed that the corporation were entitled to the summary order for possession since the occupants were remaining in occupation without the licence either of the corporation, who at the time of the summons were entitled to possession, or of Mrs Daniels who could not give an effective licence to anyone to remain in occupation of the land after she had parted with possession of it.

Pennycuick VC in *Bristol*'s case had occasion to construe the corresponding rule which is in identical words, in RSC O 113. The relevant words of RSC O 26 r 1(1) read thus:

> Where a person claims possession of land which he alleges is occupied solely by a person or persons ... who entered into or remained in occupation without his licence or consent ... .

Pennycuick VC pointed out that it is clear beyond a peradventure that this order applies to cases where a person who is alleged to be a trespasser was previously on the premises by licence.

From *Bristol*'s case it is evident that O 89 (equivalent to the English RSC O 113) applies to a person who has entered into possession of land with a licence from the previous owner but has since remained in occupation without a licence from the present owner and the previous owner cannot possibly have given an effective licence to that person to remain in occupation of the land after the previous owner had parted with that land in favour of the present owner.

Thus likewise, Oakfield have effectively parted with possession of the land when it sold the land to the plaintiff.

A strict interpretation of the above order (the English RSC O 113) was made by the Court of Appeal in *Greater London Council v Jenkins* [1975] 1 All ER 354 when Lord Diplock LJ said at p 336C:

> I personally would disagree that the court has any discretion to prevent the use of this procedure where circumstances are such as bring them within its terms.

So in simple terms, even if an entry is legal at the outset (which is disputed by the plaintiff) the defendant's continued occupation may subsequently be suffused with illegality. The current and present owner may proceed by way of an originating summons to eject the trespassers.

This court is not suggesting for a moment that the defendants' entry is legal, only that it may have been clothed with some legality then, in terms of the conditional approval given by Oakfield in years after 1994.

However the authorities cited above would suggest that a person who enters upon another's land and remains thereon to the detriment of the present owner is a trespasser, pure and simple.

The defendants' presence is literally a blot on the landscape, for the plaintiffs are hindered in the uninterrupted usage of their own property.

This observation is further fortified by Idris Yusoff J's remark in *Esso Malaysia Bhd v Hills Agency(M) Sdn Bhd & Ors* [1994] 1 MLJ 740, where His Lordship stated that at p 746D–E:

> The law is settled that the summary proceedings for possession of land can be employed in a situation where a person entitled to possession of the land claims possession of such land occupied by another person without his licence or consent or the licence or consent of any of his predecessor-in-title or in another situation where a person who has entered into occupation of the land with the licence or consent of the person entitled to possession of the land or any of his predecessor-in-title but remains in such occupation *without* licence or consent of the person entitled to possession or any predecessor-in-title of his. (Emphasis added.)

Thus on the facts, this court finds that the defendants were squatters simpliciter and are therefore not possessed of any rights.

In fact when the plaintiff became the registered proprietor the defendants became mere trespassers. The defendants have therefore failed to establish the existence of any triable issues in this case, for it to demolish the plaintiff's application under O 89 of the RHC. In that connection the mode under O 89 of the RHC was correctly applied for by the plaintiff.

Gopal Sri Ram JCA in *Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457 succinctly captured the essence of the application of O 89 RHC thus:

> Prior to the introduction of this provision [O 89 RHC] into the Rules, the only proper procedure available in all cases for the recovery of possession of immovable property was a writ action: *Yap Hong Thin v Seenavasam* [1970] 1 MLJ 143. Indeed, this continues to be the case save and except in the very limited category of cases to which O 89 applies. It is, as I have said, a summary procedure meant primarily for the eviction of squatters. For, it frequently happens that land or even a building is occupied by persons who are essentially trespassers whose identities are often unknown to the plaintiff. To require a plaintiff, in those circumstances, to commence a writ action and name the defendants would constitute the imposition of an intolerable burden upon him. It is to meet this problem that the rules committee passed O 89. That Order is not meant to be, and should not be, used for the recovery of property occupied by tenants whose tenancies have come to an end. The words in parenthesis appearing in the first Rule of that Order makes this abundantly clear. The summary jurisdiction that the Order has created is not a substitute for the ordinary action for vacant possession and should not be permitted to be so used. Where resort is had to the summary procedure, strict compliance of its terms is essential: *In Re 9, Orpen Road, Stoke Newington* [1971] 1 WLR 166; [1971]1 All ER 944 .

In any event upon registration of the plaintiff as proprietor under s 340 of the National Land Code the plaintiff's rights accrue with immediate effect. This right includes the right to immediate possession of the said land.

It would appear that the defendants are the victims of their own ignorance and ill advise.

In any case, the law disentitles the defendants from further enjoying the bounty given them by the plaintiff all these years. The defendants' continued presence would militate against the plaintiff's indefeasible title and legal rights.

This court therefore grants order in terms of the plaintiff's application with costs.

Application allowed.

Reported by Jafisah Jaafar